RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

EX PARTE JAMES T. EASTON AND JAMES McMAHON, PETITIONERS.

A contract for the use of a wharf by the master or owner of a vessel is a maritime contract, and as such cognizable in admiralty.

Such a contract, whether express or implied, if the vessel is a foreign one, or belongs to a port of another state, gives rise to a maritime lien against the vessel, which may be enforced by a proceeding *in rem* or by a suit *in personam* against the owner.

While there is no doubt of the jurisdiction of the Supreme Court to issue a writ of prohibition to the District Court, when proceeding as a court of admiralty and maritime jurisdiction, yet the facts upon which the court is to act must appear in the record.

PETITION for writ of prohibition to restrain the United States District Court for the Eastern District of New York from exercising jurisdiction in a proceeding *in rem*, to enforce an alleged lien for wharfage. The facts are sufficiently stated in the opinion of the court.

J. E. Gowen, for the petition.

F. A. Wilcox, contra.

The opinion of the court was delivered by

CLIFFORD, J.—Judicial power under the federal constitution extends to all cases of admiralty and maritime jurisdiction, and it was doubtless the intention of Congress, by the ninth section of the Judiciary Act, to confer upon the District Court the exclusive original cognizance of all admiralty and maritime causes, the words of the act being in terms exactly co-extensive with the power conferred by the constitution. In order, therefore, to determine the limits of the admiralty jurisdiction, it becomes necessary to ascertain the true interpretation of the constitutional grant. On that subject three propositions may be assumed as settled by authority, and to those it will be sufficient to refer, on the present occasion, without much discussion of the principles on which the adjudications rest: 1. That the jurisdiction of the district courts is not limited to the particular subjects over which the admiralty courts of the parent country exercised jurisdiction when our constitution was adopted; 2. That the jurisdiction of those courts does not extend to all cases which would fall within such jurisdiction according to the civil law and the practice and usages of conti-

nental Europe; 3. That the nature and extent of the admiralty jurisdiction conferred by the constitution must be determined by the laws of Congress and the decisions of this court, and by the usages prevailing in the courts of the states at the time the federal constitution was adopted. No other rules are known which it is reasonable to suppose could have been in the minds of the framers of the constitution than those which were then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts.

Authority is conferred upon the libellants as the proprietors of the wharf and slip in question by the law of the state to charge and collect wharfage and dockage of vessels lying at said wharf and within the slip adjoining the wharf of the libellants.

Sufficient appears to show that the respondents are the owners of the barge named in the libel; that on the 10th of October 1876, she completed a trip from the port of Baltimore for the port of New York, and that she took wharfage at the wharf or pier of the libellants, where she remained for eleven days. For the use of the berth occupied by the barge the libellants charged $34.20 as wharfage and dockage. Due demand was made, and payment being refused the libellants instituted the present suit, which is a libel *in rem*, against the barge to recover the amount of that charge. Process was served, and the respondents appeared and excepted to the libel, and set up that process of condemnation should not issue against the barge for the following reasons: 1. Because no maritime lien arises in the case for the matters set forth in the libel. 2. Because no lien in such a case is given for wharfage against boats or vessels by the laws of the state. 3. Because the law of the state referred to in the libel as giving a lien for wharfage is unconstitutional and void for the following reasons: 1. Because it imposes a restriction on commerce. 2. Because it imposes a duty of tonnage on all vessels of the character and description of that of the respondents. 3. Because it discriminates against the boats or barges of persons who are not citizens of the state where the proprietors of the wharf reside.

Pending the proceedings in the District Court, the respondents presented a petition here asking leave to move this court for a prohibition to the court below, forbidding the Distirict Court to proceed further in the case. Pursuant to said petition, this court entered an order permitting argument upon the merits of the petition,

and directing that due notice be given to the libellants and the clerk of the District Court. Hearing was had in conformity to that order, and the case was held under advisement.

Power is certainly vested in the Supreme Court to issue the writ of prohibition to the District Court when that court is proceeding in a case of admiralty and maritime cognizance of which the District Court has no jurisdiction: 1 Stat. at Large 81; *United States* v. *Peters*, 3 Dall. 129. Where the District Court is proceeding in a cause not of admiralty and maritime jurisdiction, the Supreme Court cannot issue the writ, nor can the writ be used except to prevent the doing of something about to be done, nor will it ever be issued for acts already completed: *Ex parte Christy*, 3 How. 292; *United States* v. *Hoffman*, 4 Wall. 158.

Admiralty and maritime jurisdiction is conferred by the constitution, and Judge STORY says it embraces two great classes of cases—one dependent upon locality, and the other upon the nature of the contract. Damage claims arising from acts and injuries done within the ebb and flow of the tide have always been considered as cognizable in the admiralty, and since the decision in the case of the *Genesee Chief*, it is considered to be equally well settled that remedies for acts and injuries done on public navigable waters, not within the ebb and flow of the tide, may be enforced in the admiralty as well as for those upon the high seas and upon the coast of the sea.

Speaking of the second great class of cases cognizable in the admiralty, Judge STORY says, in effect, that it embraces all contracts, claims and services which are purely maritime, and which respect rights and duties appertaining to commerce and navigation: 2 Story Const., sect. 1666. Public navigable waters, where interstate or foreign commerce may be carried on, of course include the high seas, which comprehend, in the commercial sense, all tide waters to high-water mark. Maritime jurisdiction of the admiralty courts in cases of contracts depends chiefly upon the nature of the service or engagement, and is limited to such subjects as are purely maritime, and have respect to commerce and navigation within the meaning of the constitution.

Wide differences of opinion have existed as to the extent of the admiralty jurisdiction, but it may now be said, without fear of contradiction, that it extends to all contracts, claims and services essentially maritime, among which are bottomry bonds, contracts of affreightment, and contracts for the conveyance of passengers,

pilotage on the high seas, wharfage, agreements of consortship, surveys of vessels damaged by the perils of the seas, the claims of materialmen and others for the repair and outfit of ships belonging to foreign nations or to other states, and the wages of mariners, and also to civil marine torts and injuries, among which are assaults or other personal injuries, collision, spoliation and damage, illegal seizures or other depredations on property, illegal dispossession or withholding of possession from the owners of ships, controversies between the part owners as to the employment of ships, municipal seizures of ships, and cases of salvage and marine insurance: Conkl. Treatise, 5th ed., 254.

Wharf accommodation is a necessity of navigation, and such accommodations are indispensable for ships and vessels and watercraft of every name and description, whether employed in carrying freight or passengers, or engaged in the fisheries. Erections of the kind are constructed to enable ships, vessels and all sorts of watercraft to lie in port in safety, and to facilitate their operation in loading and unloading cargo, and in receiving and landing passengers. Piers or wharves are a necessary incident to every well-regulated port, without which commerce and navigation would be subjected to great inconvenience, and be exposed to vexatious delay and constant peril. Conveniences of the kind are wanted both at the port of departure and at the place of destination, and the expenses paid at both are everywhere regarded as properly chargeable as expenses of the voyage. Commercial privileges of the kind cannot be enjoyed where neither wharves nor piers exist, and it is not reasonable to suppose that such erections will be constructed for general convenience unless the proprietors are allowed to make reasonable charges for their use.

Compensation for wharfage may be claimed upon an express or an implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation, and when the wharf is used without any such agreement the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred.

Such erections are indispensably necessary for the safety and convenience of commerce and navigation, and those who take berth alongside them to secure those objects derive great benefit from their use. All experience supports that proposition, and shows to

a demonstration that the contract of the wharfinger appertains to the pursuit of commerce and navigation.

Instances may, doubtless, be referred to where wharves are erected as sites for stores and storehouses, but the great and usual object of such erections is to advance commerce and navigation by furnishing resting places for ships, vessels and all kinds of water-craft, and to facilitate their operation in loading and unloading cargo, and in receiving and landing passengers.

Nor is the nature of the service or the character of the contract changed by the circumstance that the water-craft which derived the benefit in the case before the court was without masts or sails or other motive power of her own. Sail-ships, and even steamships and vessels, are frequently propelled by tugs, and yet, if they secure a berth at a wharf or in a slip at the place of landing or at the port of destination, and actually occupy the berth as a resting-place or for the purpose of loading or unloading, no one, it is supposed, will deny that the ship or vessel is just as much liable to the wharfinger as if she had been propelled by her own motive power.

Neither canal boats nor barges ordinarily have sails or steam-power, but they usually have tow-lines, and it clearly cannot make any difference, as to their liability for wharfage, whether they are propelled by steam or sails of their own, or by tugs or horse- or mule-power, if it appears that the boat or barge actually occupied a berth at the wharf or slip at the commencement or close of the trip as a resting-place, or for the purpose of loading or unloading cargo, or for receiving or landing passengers. Goods to a vast amount are transported by such means of conveyance, and all experience shows that boats of the kind require wharf privileges as well as ships and vessels or any other water-craft engaged in navigation: *The Northern Belle*, 9 Wall. 328.

Access to the ship or vessel rightfully occupying a berth at a wharf, for the purpose of lading and unlading, is the undoubted right of the owner or charterer of such ship or vessel for which such right has been secured: *Wendell* v. *Baxter*, 12 Gray 496.

Privileges of the kind are essential to the carrier by water, whether he is engaged in carrying goods or passengers.

Repairs to a limited extent are sometimes made at the wharf, but contracts of the kind usually have respect to the voyage, and are made to secure a resting-place for the vessel during the time she is being loaded or unloaded. Such contracts beyond all doubt

are maritime, as they have respect to commerce and navigation, and are for the benefit of the ship or vessel when afloat.

Carrying vessels would be of little or no value, unless they could be loaded, and they are usually loaded from the wharf, except in a limited class of cases where lighters are employed, the vessel being unable to come up to the wharf in consequence of the shoalness of the water.

Accommodations at the port of destination are equally indispensable for the voyage as those at the port of departure. Consignments of goods and passengers must be landed, else the carrier is not entitled to freight or fare. Where the contract is to carry from port to port, an actual delivery of the goods into the possession of the owner or consignee or at his warehouse is not required in order to discharge the carrier from his liability. He may deliver them on the wharf, but to constitute a valid delivery there, the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods or to put them under proper care and custody. Delivery on the wharf, under such circumstances, is valid, if the different consignments be properly separated, so as to be open to inspection and conveniently accessible to their respective owners: *The Eddy*, 5 Wall. 495.

These remarks are sufficient to show that wharves, piers or landing-places are well nigh as essential to commerce as ships and vessels, and are abundantly sufficient to demonstrate that the contract for wharfage is a maritime contract, for which, if the vessel or water-craft is a foreign one or belongs to the port of a state other than the one where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf.

Standard authorities, as well as reason, principle and the necessities of commerce, support the theory that the contract for wharfage is a maritime contract, which in the case supposed gives to the proprietor of the wharf a maritime lien on the ship or vessel for his security. From an early period wharf-owners have been allowed to exact from ships and vessels using a berth at their wharves, a reasonable compensation for the use of the same, and the ship or vessel enjoying such a privilege has always been accustomed to pay to the proprietor of such wharf a reasonable compensation for the use of the berth: *The Kate Tremaine*, 5 Ben. 611. Ancient codes and treaties, such as are frequently recognised as the source from which the rules of the maritime law are drawn, usually

treat such contracts as maritime contracts, for which the ship or vessel is liable: *The Maggie Hammond*, 9 Wall. 452; *De Lovio* v. *Boit*, 2 Gall. 472.

Charges for wharfage were adjudged to be lien claims in the District Court of the Third Circuit more than seventy years ago, and in speaking of that case, Judge STORY says that it seems to him that the decision was fully supported in principle by the doctrines as well of the common law as of the civil law, and by the analogous cases of materials furnished and repairs made upon the ship: *Ship New Jersey*, 1 Pet. Adm. 228; *Ex parte Lewis*, 2 Gall. 484, where it was expressly adjudged that the contract was necessarily maritime, giving as the reason for the conclusion that the use of the wharf is indispensable for the preservation of the vessel: *Johnson* v. *McDonough*, Gilpin 103.

Other eminent admiralty judges have decided in the same way, and among the number the late Judge WARE, whose opinion in cases involving the question of admiralty jurisdiction is entitled to the highest respect: *The Phœbe*, Ware 341; 2 Conkl. Adm., 2d ed., 515; *Bark Alaska*, 3 Ben. 392; *Hobart* v. *Drogan*, 10 Pet. 120; *The Mercer*, 1 Sprague 284; *The Ann Ryan*, 7 Ben. 21; Dunlap Adm. 75; Abbott on Ship, 5th ed., 423.

Water-craft of all kinds necessarily lie at a wharf when loading and unloading, and Mr. Benedict says that the pecuniary charge for the use of the dock or wharf is called wharfage or dockage, and that is the subject of admiralty jurisdiction; that the master and owner of the ship and the ship herself may be proceeded against in admiralty to enforce the payment of wharfage, when the vessel lies alongside the wharf or at a distance, and only uses the wharf temporarily for boats or cargo: Benedict Adm., 2 ed., sect. 283.

Application for the writ of prohibition is properly made in such a case upon the ground that the District Court has transcended its jurisdiction in entertaining the described proceeding, and whether it has or not must depend not upon facts stated dehors the record, but upon those stated in the record upon which the District Court is called to act, and by which alone it can regulate its judgment. Mere matters of defence, whether going to oust the jurisdiction of the court or to establish the want of merits in the libellants' case, cannot be admitted under such a petition here to displace the right of the District Court to entertain suits, the rule being that every such matter should be propounded by suitable pleadings as a defence for

the consideration of the court, and to be supported by competent proofs, provided the case is one within the jurisdiction of the District Court: *Ex parte Christy*, 3 How. 308.

Congress has empowered the Supreme Court to issue writs of prohibition to the district courts "when proceeding as courts of admiralty and maritime jurisdiction," by which it is understood that the power is limited to a proceeding in admiralty: Conkl. Treatise, 5th ed., 56. Such a writ is issued to forbid a subordinate court to proceed in a cause there depending on suggestion that the cognizance thereof belongeth not to the court: F. N. B. 39; 3 Bl. Com. 112; 2 Pars. on Ship. 193; 3 Bac. Abr. 206.

Viewed in the light of these considerations, it is clear that a contract for the use of a wharf by the master or owner of a ship or vessel is a maritime contract, and as such it is cognizable in the admiralty; that such a contract being one made exclusively for the benefit of the ship or vessel, a maritime lien in the case supposed arises in favor of the proprietor of the wharf against the vessel for payment of reasonable and customary charges in that behalf for the use of the wharf, and that the same may be enforced by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner.

Many other questions were discussed at the bar which will not be decided at the present time, as they are not properly involved in the application before the court.

Petition for prohibition denied.

A maritime lien depends neither upon possession nor the right of possession. Far from contemplating either, the maritime law confers a lien for supplies, repairs or bottomry, because they give the ship strength and speed to pursue her course, a lien not followed by the right of possession except by virtue of a judicial decree, "a right which enables a creditor to institute a suit to take a thing from any one who may possess it and subject it by a sale to the payment of his debts, which so inheres in the thing as to accompany it into whosesoever hands it may pass by a sale, which is not divested by a forfeiture, or mortgage, or other encumbrance created by the debtor, can only be a *jus in re* in contradistinction to a *jus ad rem*, or in contradistinction to a mere personal right or privilege. Though tacitly created by the law, and to be executed only by the aid of a court of justice, and resulting in a judicial sale, it is as really a property in the thing as the right of a pledge or the lien of a builder for work:" *The Young Mechanic*, 2 Curt. 406. See also *The Bold Buccleugh*, 7 Moore P. C. Cases 267; and *The Brig Nestor*, 1 Sumner 83.

At common law a wharfinger was allowed a lien, among other reasons, because any vessel that chose being licensed to use his wharf it was thought fair to ensure his compensation. But this lien like all others at common law

was lost by loss of possession, unless held to be maintained constructively, because the possession had been fraudulently changed.

In England the courts of common law waged a war as jealous and more successful against the admiralty than against chancery. They were stimulated not only by the natural desire to enlarge their own phylacteries, but by their dislike of processes akin to those of the civil law. By an oppressive construction of the statutes of Richard II. defining its jurisdiction they confined the admiralty to torts done and contracts made and to be performed upon the high seas. All other maritime cases fell into the common law and a very curious experience they underwent in the new forum. Because, although the courts of common law admitted the principles of the maritime law in such cases, yet they were unable to provide a remedy, having no processes to enforce a lien unaccompanied by possession. By the statutes 3 & 4 Vict. C. 65 and 24 Vict. 10, the jurisdiction of the admiralty has been greatly extended.

In section 2 of article 3 of the constitution the judicial power of the United States was extended "to all cases of admiralty and maritime jurisdiction," and it became at once a mooted question whether the jurisdiction intended was that exercised, at the time of our separation, by the admiralty in England, dwarfed by the jealousy of the common law, or whether it was the liberal jurisdiction of all causes really maritime, as allowed to the admiralty in other commercial nations. This question was set at rest by Judge STORY, in the learned case of *De Lovio* v. *Boit*, 2 Gall. 475, in which the clause received the most liberal and comprehensive construction. "If we examine the etymology or received use of the words 'admiralty' and 'maritime jurisdiction,' we shall find that they include jurisdiction of all things done upon and relating to the sea." The conclusions arrived at in this controversy are stated by Mr. Justice CLIFFORD in three propositions at the beginning of the principal case.

The libel filed in the United States District Court being *in rem*, the petitioners in the Supreme Court would have been entitled to the prohibition, if they could have established that wharfage is not a maritime contract conferring the right of lien.

Maritime contracts are classified into those which are so because of locality and those which are so because of subject-matter. Wharfage, if a maritime contract, must belong to the latter class, which Judge STORY, in sec. 1666 of his work on the constitution, says includes "contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation;" and in sec. 1671, enumerating them more at length, "the claims of materialmen and others for repairs and outfits of ships belonging to foreign nations or other states; bottomry bonds for moneys lent to ships in foreign ports, to relieve their distresses and enable them to complete their voyages; surveys of vessels damaged by perils of the seas; pilotage on the high seas; and suits for mariners' wages."

We are disposed to think that Mr. Justice CLIFFORD's vindication of the usefulness of wharves and of the general doctrines of assumpsit alone would not convince the reader that wharfage is a maritime contract and entitled to a lien, it being by no means true that all services to ships, even when very useful and deserving of compensation, are maritime or entitled to maritime liens. For instance, a stevedore has no lien for discharging the cargo: *The Amstel*, Blatch. & Howl. 215; *McDermott* v. *The Owens*, 1 Wall, Jr. 370. Nor are lighterage or services in compressing

the cargo for shipment entitled to a lien: *The Bark Joseph Cunard*, Scott Adm. 120. Nor has one employed to watch and visit a ship at anchor, open her hatches for ventilation and try her pumps, a lien: *Gurney* v. *Crockett*, Abb. Adm. 490. Nor one employed to scrape and clean the bottom of a ship in any dock: *Bradley* v. *Bolles*, Id. 569. Therefore, we shall proceed to consider the cases cited by the court in support of the judgment.

The father of them all is *Gardner* v. *The Ship New Jersey*, 1 Pet. Adm. 223, in which a ship's physician applied to be paid out of the surplus proceeds of the ship, which had been sold under a decree upon a libel for seamen's wages in the registry of the court. Judge PETERS refused to do so on the ground that no claim not a lien upon the ship should be paid out of her proceeds. In mentioning claims which should be so paid, he said: "Wharfage has been allowed out of proceeds, as the wharfinger might detain the ship until payment." This case is the first authority upon the subject, and invariably referred to, and it is curious that a remark entirely *obiter*, that wharfage is a common-law lien, should have resulted in a Supreme Court decision that it is a maritime lien.

The next case is *Ex parte Lewis*, 2 Gall. 483, which was an application by a wharfinger to be paid dockage out of the proceeds of a ship in the registry, which had been arrested while at his wharf, under a decree of the admiralty, and sold. Judge STORY, relying on the former case, said it was a lien, but that he also regarded it as a common-law lien may be seen from the case cited, viz., *Nayler* v. *Mangles*, 1 Esp. 109, a case of assumpsit, in which Lord KENYON decided that a wharfinger had by usage a lien for the balance of a general account upon goods deposited on his wharf; *Spears* v. *Hartley*, 3 Esp. 81, a case of trover, in which Lord ELDON applied the lien in favor of a wharfinger to secure a balance of an account barred by the Statute of Limitations, and *Savill* v. *Richards*, 4 Esp. 53, also trover, in which Lord KENYON sustained the lien in favor of a dyer.

Then comes the *St. Jago de Cuba*, 9 Wheat. 418, also a claim upon proceeds, in which JOHNSON, J., says: "There is, however, one item in this account, to the amount of three or four hundred dollars, which is good against all the world. This was for wharfage."

In *Johnson* v. *The McDonough*, Gilpin 103, it was contended that the wharfinger had lost his lien, and, therefore, his right to be paid out of the proceeds, because the schooner had left his wharf and gone to another before she was sold, but Judge HOPKINSON said: "It was long since decided in this court by Judge PETERS, that wharfage is allowed out of proceeds, as the wharfinger might detain the ship until payment; in other words, that a wharfinger has a lien upon the vessel for his wharfage. Judge STORY, in the *Case of Lewis*, 2 Gall. 483, has recognised and affirmed this principle. In this case it has not been questioned, but it has been insisted by the district attorney that the lien was lost by the loss of the possession of the schooner. It is certainly true that when the possession of a chattel is voluntarily given up, or other security is taken for the debt, the lien is abandoned," and then he goes on to say that the vessel having been removed without the consent and against the protest of the wharfinger it is not lost in this case.

Judge WARE, in *The Phœbe*, Ware 355, also allowed wharfage to be paid out of the proceeds in the registry, speaking of the lien as one which would be lost by loss of possession.

In none of the cases cited had there been any proceeding *in rem* for wharfage against the ship. They were simply applications to share in the funds and need not have been for that purpose

maritime rights, because the admiralty having taken jurisdiction of the *res* and converted it into money could enforce any lien against the proceeds: *Carryl* v. *Taylor*, 20 How. 483.

In the case of *The General Smith*, 4 Wheat. 438, a materialman in the state of Maryland having filed a libel *in rem* against a domestic ship, it was objected that the common law, which was the law of Maryland, did not recognise any lien apart from possession for supplies furnished or repairs done to a domestic ship. This view the court, Judge STORY delivering the opinion, sustained on the ground that the ship being a domestic one the question of lien must be settled by the municipal law. This was certainly following the common law in a distinction between domestic and foreign ships not recognised by the maritime law further than might have been expected from one who had been mainly instrumental in rejecting the unreasonable limits it had put upon the admiralty. What was implied in this case, viz., that when the local law gave a lien against domestic vessels it would be enforced in the federal courts, was positively decided in subsequent cases: *The Calisto*, Davies 31; *Davis* v. *Child*, Id. 78; *Peyloun* v. *Howard*, 7 Pet. 342; and in accordance with these decisions was Admiralty Rule 12, 1844. "In all suits by materialmen for supplies or repairs or other necessaries for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem* or against the master or the owner alone *in personam*. And the like proceedings *in rem* shall apply to cases of domestic ships where by the local law a lien is given to materialmen for supplies, repairs or other necessaries."

In *Russell* v. *The Asa R. Swift*, Newberry 553, a wharfinger to whom the local law gave a lien for wharfage had proceeded *in rem* against the Asa R. Swift, a domestic vessel. The court decided that this lien could not be enforced in admiralty by virtue of Rule 12, because it applied only to liens given to materialmen, which a wharfinger could not be considered to be. Nor could it be considered a maritime lien and enforceable as such, it being a lien at common law requiring possession, as had been held by Mr. Justice STORY in *Ex parte Lewis*, *supra*. "Mr. Justice STORY, who drew up these rules, makes this distinction in *Ex parte Lewis*, 2 Gall. 483. But wharfage not being a lien under the general maritime law, and only such by the statute of the state, the claim as regards the occasional occupation of the Canada wharf, is only enforceable as a *common-law lien*. As such, the wharfinger could detain the vessel until payment, but if he failed to do this and parted with his temporary possession, his lien ceased, and such was the ruling of Mr. Justice STORY, in the case already cited from 2 Gallison."

In 1859. Rule 12 was amended by substituting for the last sentence the following: "And the like proceedings *in personam*, but not *in rem*, shall apply to cases of domestic ships for supplies, repairs or other necessaries." This amendment was evidently made to correct the direction taken in the case of *The General Smith*, as clearly appears in *Maguire* v. *Card*, 21 How. 248.

In the case of the *Canal Boat Kate Tremaine*, 5 Ben. 60, a libel *in rem* had been filed for wharfage against a domestic vessel, the local law conferring a lien for wharfage. Judge BENEDICT took the ground that wharfage was, on the authority of the cases cited above, a maritime contract conferring the right of lien and as such enforceable in admiralty. A wharfinger not being a materialman, Rule 12 did not apply, and the decision resting upon the ground that wharfage was a lien by the maritime law, it was not necessary to discuss the effect of the local law conferring a lien under the case of *The General Smith* and admiralty Rule 12 as amended.

McKENNAN, J., of the United States Circuit Court, in the case of *Storage Co.* v. *The Barque Thomas*, 29 Leg. Int. 116, decided in the Eastern District of Pennsylvania, said, "The libellants are wharfingers at Philadelphia, and presented their libel *in rem* to the District Court to enforce the payment of wharfage as a maritime lien, upon the respondent's vessel. There is no authoritative adjudication that a claim of this sort stands upon such a footing. Certainly it has not been so decided by the Supreme Court. The weight of judicial opinion is the other way. It has generally been treated only as a common-law lien, to be enforced by the detention of the vessel by the wharfinger, or to be recognised and paid as such out of the proceeds of the sale of the vessel, which had been brought under the control of the court, otherwise than by an original libel filed upon the dockage demand. This is the import of the opinion of Judge PETERS, in *The New Jersey*, 1 Pet. Adm. 223, and of Mr. Justice JOHNSON, in *The St. Jago de Cuba*, 9 Wheat. 418, and I do not regard the opinion of Judge STORY, in *Ex parte Lewis*, 2 Gall. 483, as determining a different rule. Until the Supreme Court shall decide otherwise, I see no reason for expanding the admiralty cognizance of a demand which rests securely upon a basis of common-law right and for the enforcement of which, by the wharfinger himself, the common law supplies an effectual remedy. The disallowance of the libel by the District Court is therefore affirmed." The decree in the United States District Court was entered by Judge CADWALADER, than whom no man would be less likely to go wrong on a point of maritime law or usage.

The decision in the *Kate Tremaine*, *supra*, was followed in *The Alexander McNeill*, 20 Int. Rev. Record 175, decided in the United States District Court at Savannah, Ga. They were the only cases which we know deciding positively that wharfage is a maritime contract and entitled to a maritime lien, and with the opposite decision: *Russell* v. *The Asa R. Swift*, *supra*; *The Gem*, 1 Brown's Adm. 37, and *The Storage Co.* v. *Barque Thomas*, *supra*, were the only ones in which proceedings *in rem* were instituted for wharfage. So far as Judge BENEDICT'S views depend upon previous American decisions, they are ill-supported and they do not appear to be in harmony with the case of *The General Smith*, or with Rule 12 in Admiralty as amended, both of which, rejecting the principle of the civil and maritime law, followed the lead of the English courts in distinguishing, as regards the right of lien, between foreign and domestic ships.

With the law in this condition, the Supreme Court has by the principal case settled the question in accordance with Judge BENEDICT'S views. It is true that in this case, the barge was foreign, whereas the *Kate Tremaine* was domestic, but the opinion states the law broadly and flatly without qualifications as he did. If there is any danger to be feared from the language used, it is that it may confirm a very general disposition to suppose that every contract with a master is a maritime contract and that every maritime contract will support proceedings *in rem*. Perhaps it is not profitable to speculate whether the decision is a correct deduction from the cases cited, because it has *effectually* laid all doubts as to whether wharfage is entitled to a maritime lien.

H. G. W.